

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

THEODORE KENNEDY, JR. et al.,)
Plaintiffs,)
vs.)
CARRIAGE CEMETERY SERVICES, INC.)
et al.,)
Defendants.)
Case No.: 2:08-cv-01102-GMN-RJJ
ORDER

ORDER

This case arises out of the accidental cremation of Theodore Kennedy, contrary to the wishes of his family that he be buried. Defendant Palm Mortuary has settled with Plaintiffs, leaving Carriage Cemetery Services, Inc. (“Carriage”) as the only remaining Defendant. Pending before the Court is Carriage’s Motion for Partial Summary Judgment (#98). Plaintiffs filed a response two days late.¹ For the reasons given herein, the Court grants the motion in part and denies it in part.

I. FACTS AND PROCEDURAL HISTORY

¶ 15). Kennedy was survived by his son, Plaintiff Theodore Kennedy, Jr.; his brothers, Plaintiffs

¹This constitutes consent to granting the motion. L.R. 7-2(d).

1 James Kennedy, Willie Wade, and Carnell Washington (“Washington”); his sister, Plaintiff
 2 Viola Washington; and two sisters who are not parties to this action. Wade and Washington
 3 contracted with Carriage to provide burial and funeral services for Kennedy. (*Id.* ¶ 17). Plaintiffs
 4 had previously made known to Carriage’s representatives Shannon Nordyke and Daniel Lang
 5 their distaste for the practice of cremation, and Carriage’s representatives assured them that
 6 Kennedy could not be cremated without obtaining the family’s consent. (*Id.* ¶ 14). On December
 7 12, 2007, Nordyke asked Wade to come to her office alone where she informed Wade that Palm
 8 Mortuary had cremated Kennedy’s remains after Carriage transferred his remains there. (*Id.*
 9 ¶¶ 19–20).

10 On July 28, 2008, the Estate of Theodore Kennedy, Willie Wade, Carnell Washington,
 11 Viola Washington, James Kennedy, and Theodore Kennedy, Jr. sued Carriage in the Clark
 12 County District Court on nine causes of action: (1) breach of contract; (2) breach of the covenant
 13 of good faith and fair dealing; (3) breach of fiduciary duty; (4) negligent misrepresentation; (5)
 14 negligence; (6) negligent interference with remains and intentional mishandling of a corpse; (7)
 15 intentional infliction of emotional distress (“IIED”); (8) negligent infliction of emotional distress
 16 (“NIED”); and (9) unjust enrichment. (#1, Ex. A). Defendants removed.

17 On September 18, 2009, the Court granted Plaintiffs leave to amend the Complaint, with
 18 the caveat that no claims could lie by the Estate for emotional distress or by the Estate, James
 19 Kennedy, or Viola Washington for breach of fiduciary duty. (*See* #64 at 6:4–8). The First
 20 Amended Complaint (“FAC”) (#56) added Palm Mortuary as a Defendant² and listed ten causes
 21 of action: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3)

23 ²Palm Mortuary has since settled with Plaintiffs.

1 breach of fiduciary duty; (4) negligent misrepresentation; (5) negligence; (6) negligent
2 interference with remains and intentional mishandling of a corpse; (7) IIED; (8) NIED; (9) unjust
3 enrichment; and (10) declaratory relief.

4 Carriage, the only remaining Defendant, has moved for partial summary judgment on the
5 causes of action for breach of the covenant of good faith and fair dealing, breach of fiduciary
6 duty, negligent misrepresentation, unjust enrichment, IIED, and NIED. Carriage also requests
7 summary judgment on the issue of punitive damages.

8 **II. SUMMARY JUDGMENT STANDARDS**

9 The Federal Rules of Civil Procedure provide for summary adjudication when “the
10 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
11 affidavits, if any, show that there is no genuine issue as to any material fact and that the party is
12 entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). Material facts are those which
13 may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
14 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable
15 jury to return a verdict for the nonmoving party. *See id.* “Summary judgment is inappropriate if
16 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict
17 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th
18 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A
19 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
20 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

21 In determining summary judgment, a court applies a burden-shifting analysis:

22 When the party moving for summary judgment would bear the burden of proof at
23 trial, it must come forward with evidence which would entitle it to a directed
verdict if the evidence went uncontested at trial. In such a case, the moving

1 party has the initial burden of establishing the absence of a genuine issue of fact
2 on each issue material to its case.

3 *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations
4 and internal quotation marks omitted). In contrast, when the nonmoving party bears the burden
5 of proving the claim or defense, the moving party can meet its burden in two ways: (1) by
6 presenting evidence to negate an essential element of the nonmoving party's case; or (2) by
7 demonstrating that the nonmoving party failed to make a showing sufficient to establish an
8 element essential to that party's case on which that party will bear the burden of proof at trial.

9 *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden,
10 summary judgment must be denied and the court need not consider the nonmoving party's
11 evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

12 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
13 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith
14 Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
15 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient
16 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’
17 differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809
18 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary
19 judgment by relying solely on conclusory allegations that are unsupported by factual data. *See*
20 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the
21 assertions and allegations of the pleadings and set forth specific facts by producing competent
22 evidence that shows a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *Celotex Corp.*, 477 U.S.
23 at 324.

24 At summary judgment, a court's function is not to weigh the evidence and determine the

1 truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249.
 2 The evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn
 3 in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not
 4 significantly probative, summary judgment may be granted. *See id.* at 249–50.

5 **III. ANALYSIS**

6 **A. Breach of the Covenant of Good Faith and Fair Dealing**

7 Every contract gives rise to a duty not to act arbitrarily or unfairly to the detriment of the
 8 other party. *Nelson v. Heer*, 163 P.3d 420, 427 (Nev. 2007). Breach of this duty is a tort
 9 different in nature from a claim for the underlying breach of contract. *See Ins. Co. of the West v.*
 10 *Gibson Tire Co., Inc.*, 134 P.3d 698, 702 (Nev. 2006). A bad faith claim is predicated on the
 11 abuse of a fiduciary relationship existing between parties to certain kinds of contracts; it does not
 12 arise simply from a particularly egregious or willful breach of a contract, as litigants often imply
 13 by reflexively pleading bad faith along with nearly every breach of contract claim:

14 Although every contract contains an implied covenant of good faith and
 15 fair dealing, an action in tort for breach of the covenant arises only “in rare and
 16 exceptional cases” when there is a special relationship between the victim and
 17 tortfeasor. A special relationship is “characterized by elements of public interest,
 18 adhesion, and fiduciary responsibility.” Examples of special relationships include
 19 those between insurers and insureds, partners of partnerships, and franchisees and
 20 franchisers. Each of these relationships shares “a special element of reliance”
 21 common to partnership, insurance, and franchise agreements. We have
 22 recognized that in these situations involving an element of reliance, there is a need
 23 to “protect the weak from the insults of the stronger” that is not adequately met by
 24 ordinary contract damages. In addition, we have extended the tort remedy to
 certain situations in which one party holds “vastly superior bargaining power.”

20 *Id.* (footnotes omitted). The Washington Supreme Court has similarly described the bad faith
 21 tort as “the intentional abuse of a fiduciary relationship.” *Kirk v. Mt. Airy Ins. Co.*, 951 P.2d
 22 1124, 1126 (Wash. 1998). Accordingly, the most common and appropriate targets of bad faith
 23 claims are insurers. *See, e.g., Allstate Ins. Co. v. Miller*, 212 P.3d 318, 324 (Nev. 2009).

1 The threshold inquiry, therefore, is whether a funeral home, cemetery, or mortuary owes
2 a fiduciary duty to its bereaved customers. The Nevada Supreme Court does not appear to have
3 addressed the issue, but the weight of authority is against finding any fiduciary duty. The South
4 Dakota Supreme Court, for example, has ruled that there is no fiduciary relationship between a
5 city cemetery and the parents of a decedent interred there, because although the parents
6 purchased a plot and attendant services, they “did not relinquish control over confidential
7 decision making inherent in fiduciary relationships.” *Gakin v. City of Rapid City*, 698 N.W.2d
8 493, 500 (S.D. 2005). The Ohio Court of Appeals has specifically held that as a matter of law
9 there is no fiduciary relationship between funeral homes and their customers in wrongful burial
10 cases. *See Evans v. Chambers Funeral Homes*, No. 89900, 2008 WL 2766173, at *3 (Ohio Ct.
11 App. July 17, 2008). The United States District Court for the Northern District of Georgia
12 recently found that “Georgia law does not recognize a fiduciary duty between funeral homes and
13 persons contracting for the services of funeral homes.” *In re Tri-State Crematory Litig.*, 215
14 F.R.D. 660, 683 (N.D. Ga. 2003). The California Court of Appeals has ruled that there is no
15 fiduciary duty for a mortuary to provide an appropriate and dignified burial service, but noted in
16 dicta that it is not impossible that there may be a fiduciary duty in connection with statutory
17 obligations to prepare and expeditiously dispose of remains. *See Wilson v. Houston Funeral*
18 *Homes*, 50 Cal. Rptr. 2d 169, 178 (Ct. App. 1996). The FAC ultimately alleges a duty to provide
19 an appropriate and dignified burial service, not a duty to properly dispose of the body for public
20 health reasons. *See id.* (“In our view, this duty cannot properly be described as a fiduciary one.
21 Rather, as we have explained above, it is a duty arising from the mortuary’s ‘special relationship’
22 with the family by virtue of the nature of the services the mortuary agrees to perform beyond
23 mere disposal of the body in conformity with legal requirements.”).
24

1 On the other hand, the North Carolina Court of Appeals has written in dicta that “a
2 personal service contract to provide funeral arrangements might, in appropriate factual
3 circumstances, give rise to a fiduciary relationship.” *Pacheco v. Rogers & Breece, Inc.*, 579
4 S.E.2d 505, 510 (N.C. Ct. App. 2003). That court found no fiduciary relationship between a
5 cemetery and a widow who had not maintained contact with the cemetery for seven years and
6 had failed to object to her mother-in-law’s court petition to have her deceased husband’s remains
7 disinterred. *See id.* at 506, 510.

8 In summary, it does not appear that any court has held that a fiduciary relationship exists
9 in circumstances such as those here. The Court will therefore grant the motion as against this
10 cause of action in tort.

11 Plaintiffs argue that this cause of action also lies in contract, because it essentially
12 constitutes a breach of contract for one party to act arbitrarily or unfairly to disadvantage the
13 other party under the contract. However, Plaintiffs allege negligence, not a purposeful
14 circumvention of the contract in order to cheat Plaintiffs. Incidentally, Defendant has not moved
15 for summary judgment on Plaintiffs’ breach of contract claim, and the undisputed facts in this
16 case make it almost certain that Defendant will be held liable for breach of contract. A verdict
17 for a breach of the contractual duty of good faith would be duplicative, because this cause of
18 action is essentially a failsafe for when a defendant does not in fact violate contractual terms but
19 treats the plaintiff unfairly under it:

20 A good, illustrative example of a claim for contract damages for breach of
21 the covenant of good faith and fair dealing can be seen in percentage lease cases.
22 For example, if a lessee agrees to pay a certain percentage of gross sales receipts
23 as rental and then deliberately alters its business in a way that reduces expected
24 sales (say, by diverting business to another store for the sole purpose of bringing
down the rental), the lessee would not be acting in good faith. In such a case the
lessee would be abiding with the literal terms of the contract but could still be
liable for losses resulting from breach of the covenant of good faith.

Hilton Hotels Corp. v. Butch Lewis Prods., Inc., 808 P.2d 919, 924 n.6 (Nev. 1991) (citation omitted). There is no evidence of an analogous fact pattern in this case. Here, the Defendant is alleged to have violated the actual terms of the contract.

B. Breach of Fiduciary Duty

Because this cause of action is redundant with the bad faith tort claim, and because there is no fiduciary duty in this case, the Court will grant the motion as against this cause of action.

C. Negligent Misrepresentation

In Nevada,

a claim for negligent misrepresentation requires a plaintiff to plead: 1) a representation that is false; 2) that the representation was made in the course of the defendant's business or in any action in which he has a pecuniary interest; 3) the representation was for the guidance of others in their business transactions; 4) the representation was justifiably relied upon; 5) that such reliance resulted in pecuniary loss to the relying party; and 6) that the defendant failed to exercise reasonable care or competence in obtaining or communicating the information.

G.K. Las Vegas Ltd. P'ship, 460 F. Supp. 2d at 1262. Under Rule 9(b), circumstances constituting fraud or mistake must be stated with particularity. Fed. R. Civ. P. 9(b). This has been construed to require a plaintiff to “state precisely the time, place and nature of the misleading statements, misrepresentations and specific acts of fraud.” *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994). A plaintiff must plead facts such as “he bought a house from defendant, that the defendant assured him that it was in perfect shape, and that in fact the house turned out to be built on a landfill” *Warshaw v. Xoma Corp.*, 74 F.3d 955, 960 (9th Cir 1996) (quoting *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc)). The plaintiff must also “set forth an explanation as to why the statement or omission complained of was false and misleading.” *In re GlenFed Sec. Litig.*, 42 F.3d at 1548.

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1 The negligent misrepresentation claim is based on a December 10, 2007 statement by a
2 representative of Defendant, Daniel Lang, that Kennedy could not be cremated without
3 Plaintiffs' consent. (First. Am. Compl. ¶ 14). The FAC is not verified. Although Plaintiffs have
4 not adduced evidence to support this claim, they need not do so, because Defendant has not
5 carried its initial burden under summary judgment to negate the claim. Mr. Lang did not testify
6 at his deposition that he never made the alleged representation. (*See* #98, Ex. H). In fact, he
7 admits he did not have authorization from Plaintiffs to cremate Mr. Kennedy. (*See id.*, Ex. H, at
8 23:23–24:4). Carriage also argues that this claim fails as a matter of law because the only injury
9 Plaintiffs allege to have suffered due to the misrepresentation—personal injury, as opposed to
10 pecuniary loss—is not cognizable under a negligent misrepresentation claim, *see Bank of Nev. v.*
11 *Butler Aviation-O'Hare, Inc.*, 616 P.2d 398, 399 n.1 (Nev. 1980) (citing Restatement (Second) of
12 Torts § 552); however, Plaintiffs do allege pecuniary loss via payment for services. The Court
13 will therefore deny the motion as to this cause of action.

14 **D. Unjust Enrichment**

15 In Nevada, the elements of an unjust enrichment claim or “quasi contract” are: (1) a
16 benefit conferred on the defendant by the plaintiff; (2) appreciation of the benefit by the
17 defendant; and (3) acceptance and retention of the benefit by the defendant (4) in circumstances
18 where it would be inequitable to retain the benefit without payment. *See Leasepartners Corp.,*
19 *Inc. v. Robert L. Brooks Trust*, 942 P.2d 182, 187 (Nev. 1997) (quoting *Unionamerica v.*
20 *McDonald*, 626 P.2d 1272, 1273 (Nev. 1981) (quoting *Dass v. Epplen*, 424 P.2d 779, 780 (Colo.
21 1967))). An indirect benefit will support an unjust enrichment claim. *Topaz Mut. Co., Inc. v.*
22 *Marsh*, 839 P.2d 606, 613 (Nev. 1992) (recognizing an actionable unjust enrichment claim where
23 there was an indirect benefit conferred upon the defendant). Unjust enrichment is an equitable

1 substitute for a contract, and an action for unjust enrichment therefore cannot lie where there is
 2 an express written agreement. *See Marsh*, 839 P.2d at 613 (citing *Lipshie v. Tracy Inv. Co.*, 566
 3 P.2d 819, 824 (Nev. 1977); 66 Am. Jur. 2d *Restitution* §§ 6, 11 (1973)). Here, Plaintiffs
 4 specifically allege Wade and Washington entered into a contract with Carriage. (#56 ¶ 17).
 5 Plaintiffs have agreed to withdraw this cause of action based on their own research of the case
 6 law. (*See* #101 at 21:6–10). The Court will therefore grant the motion as to this cause of action.

7 **E. IIED**

8 The elements of an IIED claim are “(1) extreme and outrageous conduct with either the
 9 intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff’s having
 10 suffered severe or extreme emotional distress and (3) actual or proximate causation.” *Star v.*
 11 *Rabello*, 625 P.2d 90, 91–92 (Nev. 1981).

12 Plaintiffs allege the reckless handling of Kennedy’s remains contrary to the wishes of the
 13 decedent and the family. This is sufficient to satisfy the first element. Plaintiffs also allege
 14 serious mental injuries and emotional distress caused by the accidental cremation. However,
 15 most of the Plaintiffs allege no physical injury or illness caused by the alleged emotional distress,
 16 which is required when there is no physical impact to the Plaintiff. *Barmettler v. Reno Air, Inc.*,
 17 956 P.2d 1382, 1387 (Nev. 1998).

18 The emotional harm alleged by Plaintiffs is not actionable under an IIED claim.
 19 Insomnia and nightmares standing alone will not support an IIED claim in Nevada. In *Miller v.*
 20 *Jones*, the Nevada Supreme Court affirmed summary judgment against an IIED claim where:

21 [plaintiff failed] to point to any evidence which demonstrate[d] that he suffered
 22 from severe or extreme emotional distress. Although [plaintiff] stated in his
 23 deposition that he was depressed for some time, he did not seek any medical or
 24 psychiatric assistance. He presented no objectively verifiable indicia of the
 severity of his emotional distress. We conclude that [plaintiff’s] brief depositional
 testimony regarding depression was insufficient to raise a genuine issue of

1 material fact as to whether he suffered severe emotional distress. Accordingly,
 2 we conclude that the district court did not err in granting summary judgment on
 3 the IIED claim.

4 970 P.2d 571, 577 (Nev. 1998). The Court reaffirmed the rule this year:

5 We have previously required a plaintiff to demonstrate that he or she has
 6 suffered some physical manifestation of emotional distress in order to support an
 7 award of emotional damages. *See, e.g., Barmettler v. Reno Air, Inc.*, 114 Nev.
 8 441, 448, 956 P.2d 1382, 1387 (1998) (“[I]n cases where emotional distress
 9 damages are not secondary to physical injuries, but rather, precipitate physical
 10 symptoms, either a physical impact must have occurred or, in the absence of
 11 physical impact, proof of ‘serious emotional distress’ causing physical injury or
 12 illness must be presented.”); *Chowdhry v. NVLH, Inc.*, 109 Nev. 478, 482–83, 851
 13 P.2d 459, 462 (1993). While we have relaxed the physical manifestation
 14 requirement in a few limited instances, *see Olivero v. Lowe*, 116 Nev. 395, 400,
 15 995 P.2d 1023, 1026 (2000) (explaining that the physical manifestation
 16 requirement is more relaxed for damages claims involving assault), we cannot
 17 conclude that a claim for emotional distress damages resulting from deceptive
 18 trade practices in connection with a failed real estate and lending transaction
 19 should be exempted from the physical manifestation requirement.

20 *Betsinger v. D.R. Horton, Inc.*, 2010 WL 2145448, at *3, 126 Nev. 17 (2010). The basis for the
 21 emotional distress claims here is not assault. The only symptoms Plaintiffs claim is insomnia
 22 and general nervousness, which is not objectively verifiable and will not support emotional
 23 distress damages in Nevada for a tort arising out of a purely emotionally upsetting situation, as
 24 opposed to a physical injury. There is also no evidence of any Plaintiff having sought
 psychiatric assistance or medication. The case Plaintiffs cite to support this element of their case
 involved a plaintiff who had to see a psychotherapist, and that case is an unpublished 1997 case
 from the Northern District of Illinois. The Court therefore grants summary judgment on this
 cause of action.

25 **F. NIED**

26 The Nevada Supreme Court last laid out the elements of a separate NIED claim in 1999:
 27 “the witness-plaintiff must prove that he or she (1) was located near the scene; (2) was
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1 emotionally injured by the contemporaneous sensory observance of the accident; and (3) was
2 closely related to the victim.” *Grotts v. Zahner*, 989 P.2d 415, 416 (Nev. 1999). This is a version
3 of the “*Dillon* rule.” Dan B. Dobbs, *The Law of Torts* § 302 (West 2000); *see Dillon v. Legg*, 441
4 P.2d 912, 920 (Cal. 1968). Nevada expressly adopted the *Dillon* rule in *State v. Eaton*, 710 P.2d
5 1370, 1377–78 & n.11 (Nev. 1985).

6 In summary, Nevada recognizes the traditional NIED tort for a bystander’s emotional
7 injury caused by witnessing physical injury to a third-person caused by a defendant’s negligence.
8 This is the crux of an NIED claim. Although the names of the two causes of action imply that an
9 NIED claim is simply an IIED claim with “negligence” substituted for “intent” (or in some
10 states, such as Nevada, “intent or recklessness”), this is not so. A separate claim of NIED
11 typically lies only where the emotional harm is based on observance of a physical injury to
12 another, usually a close relative.

13 The Nevada Supreme Court has stated that it recognizes torts for both IIED and NIED in
14 the context of wrongful employment termination, and that in either case, “the plaintiff needs to
15 show ‘extreme and outrageous conduct with either the intention of, or reckless disregard for,
16 causing emotional distress.’” *State v. Eighth Judicial Dist. Court ex rel. County of Clark*, 42 P.3d
17 233, 241 (quoting *Shoen v. Amerco.*, 896 P.2d 469, 476 (1995) (quoting *Star v. Rabello*, 625
18 P.2d 90, 91–92 (Nev. 1981))). This statement requires further analysis, however, because the
19 implication that a claim for NIED must include intent or recklessness on the part of the tortfeasor
20 appears at odds with itself and may be an indication that the Court misspoke when it
21 characterized the nature of the claim. Intent (and in some states, such as Nevada, either intent or
22 recklessness) must be shown to prove IIED, but a separate NIED claim requires only simple
23 negligence.

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1 A closer analysis indicates that the Court in *Eighth Judicial Dist. Court* was not referring
2 to NIED as a separate cause of action, but rather was referring to the fact that damages can be
3 recovered for emotional harm stemming from other intentional or negligent torts. This measure
4 of damages is sometimes called “parasitic damages.” *See Dobbs, supra*, § 302. This reading is
5 supported by the fact that the Court in *Eighth Judicial Dist. Court* cited only to a page of *Shoen*
6 that discusses IIED, not to the later pages that discuss NIED. Furthermore, *Rabello*, the origin of
7 the above quotation from *Eighth Judicial Dist. Court*, involved no NIED claim at all, but only an
8 IIED claim. *See* 625 P.2d at 91–92. In the relevant passage in *Shoen* that actually discusses
9 NIED—a passage to which the *Eighth Judicial Dist. Court* Court did not cite—the *Shoen* Court
10 stated:

11 An examination of the case law indicates that Nevada has not expressly
12 permitted damages to be recovered for the infliction of emotional distress in a
13 negligence cause of action. [But i]f a bystander can recover for the negligent
14 infliction of emotional distress, it is only logical that the direct victim be
15 permitted the same recovery. Many times a tort claim may be based on evidence
16 that presents a close case of whether an intentional or a negligent act was
committed. In these cases, the direct victim should be able to assert a negligence
claim that includes *emotional distress as part of the damage* suffered as well as an
intentional tort cause of action. Accordingly, we recognize that the negligent
infliction of emotional distress can be *an element of the damage sustained* by the
negligent acts committed directly against the victim-plaintiff.

17 896 P.2d at 477 (emphases added). *Shoen* recognized that it would be inconsistent to hold that
18 the doctrine of proximate cause permits a separate NIED tort when a bystander who is not
19 physically injured suffers emotional distress by merely witnessing another’s injury, but to then
20 hold that emotional distress is unavailable as a measure of damages for the direct victim of the
21 negligence.

22 Plaintiffs note that under this line of cases no bystander harm is necessary for an NIED
23 claim. But Plaintiffs state the *Shoen* rule too broadly. *Shoen* permits a direct victim of a
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1 defendant's negligence to recover emotional damages, but there still must be an underlying
 2 injury separate from the emotional harm. Although *Shoen* made emotional harm available as a
 3 measure of damages for a simple negligence claim, the case did not expand the NIED cause of
 4 action itself to include an alternative to IIED where the defendant's extreme and outrageous
 5 conduct was merely negligent. The significance of the distinction is that to recover parasitic
 6 damages for emotional harm based on a simple negligence claim, a plaintiff must prove
 7 cognizable harm separate from the emotional harm itself, whereas a putative NIED claim that
 8 mirrors an IIED claim in all aspects but mens rea would permit recovery based on emotional
 9 harm alone. No such cause of action exists, except in Hawai'i.³ Because neither a bystander-
 10 harm situation nor any physical injury to Plaintiffs is alleged in this case, the Court grants
 11 summary judgment on the NIED cause of action. And although emotional harm is potentially
 12 available as a measure of damages if other claims in this case are established, *see Shoen*, 896
 13 P.2d at 477, recovery of this measure of damages in Nevada without physical impact requires
 14 evidence of physical manifestation, *see Betsinger*, 2010 WL 2145448, at *3.

15 **G. Punitive Damages**

16 In Nevada, punitive damages may only be awarded "where it is proven by clear and
 17 convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or
 18 implied." Nev. Rev. Stat. § 42.005(1). "'Oppression' means despicable conduct that subjects a
 19 person to cruel and unjust hardship with conscious disregard of the rights of the person."
 20 § 42.001(4). "'Fraud' means an intentional misrepresentation, deception or concealment of a

21
 22 ³Only Hawaii permits simple negligence claims based purely on emotional harm without any
 23 physical or economic "host" injury—the kind of claim Plaintiffs plead. *See Doe Parents No. 1 v.*
24 State Dep't of Educ., 58 P.3d 545, 580 (Haw. 2002) ("[A]n NIED claim is nothing more than a
 negligence claim in which the alleged actual injury is wholly psychic . . .").

1 material fact known to the person with the intent to deprive another person of his or her rights or
2 property or to otherwise injure another person.” § 42.001(2). “‘Malice, express or implied’
3 means conduct which is intended to injure a person or despicable conduct which is engaged in
4 with a conscious disregard of the rights or safety of others.” § 42.001(3). “‘Conscious disregard’
5 means the knowledge of the probable harmful consequences of a wrongful act and a willful and
6 deliberate failure to act to avoid those consequences.” § 42.001(1). “[Conscious disregard]
7 plainly requires evidence that a defendant acted with a culpable state of mind . . . [A]t a
8 minimum, [it] must exceed mere recklessness or gross negligence.” *Countrywide Home Loans,*
9 *Inc. v. Thitchener*, 192 P.3d 243, 255 (Nev. 2008).

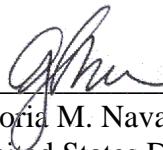
10 Defendant has not met its initial burden. As Plaintiff notes, Defendant has not even
11 identified, and might not even know, which employee or employees caused the error. Defendant
12 has therefore not shown that there is no genuine issue of material fact as to oppression, fraud, or
13 malice. If an employee is culpable under this standard, so is the employer if it authorized or
14 ratified the action or is otherwise personally responsible. *See* Nev. Rev. Stat. § 42.007(1)(b)–(c).
15 The Court therefore denies the motion as to punitive damages.

16 CONCLUSION

17 IT IS HERBY ORDERED that the Motion for Partial Summary Judgment (#98) is
18 GRANTED in part and DENIED it in part. Summary judgment is granted on the causes of
19 action for breach of the covenant of good faith and fair dealing, breach of fiduciary duty, unjust
20 enrichment, IIED, and NIED. Summary judgment is denied on the cause of action for negligent
21 // /
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1 misrepresentation and on the issue of punitive damages.

2 DATED this 19th day of July, 2010.

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5 Gloria M. Navarro
6 United States District Judge
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